NO. 48051-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

DONALD W. GREELEY and BESSIE L. GREELEY, husband and wife

Respondents,

vs.

FRANK A. MINNICK and JANE DOE MINNICK, husband and wife

Appellants.

BRIEF OF RESPONDENTS

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NATURE OF THE CASE

This is an appeal from a trial court decision upholding an award in a private arbitration. As he did in the trial court, Appellant (defendant Minnick) asks this court to re-examine the evidence and reverse the decision of the arbitrator. Because the appeal is not properly before the court under RAP 2.2(c), it should be dismissed. Regardless, because the face of the award does not show errors of law, Minnick's appeal is unfounded, and this court should affirm the trial court's order.

STATEMENT OF THE CASE

On May 25, 2012, Donald and Bessie Greeley filed suit in Pierce County Superior court to quiet title to a disputed parcel of land located between their property and property owned by Frank Minnick. (CP 1-9) Greeley claimed they were owners of the disputed property in fee by virtue of a quit claim deed dated September 27, 1997, and had been in actual, open and notorious possession of the property since then. (CP 2)

By agreement, Greeley and Minnick submitted their claims to arbitration. (CP 13-18) The transfer to arbitration occurred by way of subjoined stipulation and order. (CP 13-18) In their stipulation, the parties limited their rights to appeal according to the State and Local Superior Court Rules for Mandatory Arbitration.

> The decision of the arbitrator shall be final and binding as to any facts determined, but shall be appealable to the Superior Court only as to errors as a matter of law (record review in the same procedure as appeals from Courts of Limited Jurisdiction). (CP 14, lns. 13-17)
>
> Should either party appeal on issues as a matter of law, the matter may be scheduled to be heard by motion, as would a proceeding from a ruling from a court of limited jurisdiction. (CP 15, lns. 5-9)

The subjoined order included these statements, and also provided that arbitration would be conducted according to the State and Local Superior Court Rules for Mandatory Arbitration. (CP 15, ln. 22 - 16, ln. 11)

Arbitration occurred on November 25, 2014. (CP 22) The arbitrator heard testimony of witnesses – none of which is contained in the record on appeal – and reviewed various documents which he did not list. (CP 36-37, 101) On December 12, 2014, by letter ruling which included findings, he decided that the Greeleys had established all the elements of adverse possession under RCW 7.28.070, and ruled in their favor. (CP 23-25) The arbitrator found that Greeleys were deeded the property in 1997 (FOF 3, 6); from 1997 to 2011 all parties believed Greeleys were the owners (FOF 4); from 1997 to 2011 Greeley asserted control over the property and Minnick did not contest that control (FOF 8); the 1997 deed gave Greeley color of title (FOF 13); Plaintiffs cared for and used the property in a way consistent with ownership (FOF 14, 18); Greeley's use was sufficient to show hostile and

exclusive possession (FOF 19). The arbitrator filed the award on February 18, 2015. (CP 22)

On February 24, 2015, Minnick filed a "Notice of Appeal" of the arbitration award. (CP 19-32) He described the appealable issue as "the finding of the arbitrator that the Plaintiff prevailed on the claim of ownership of the disputed property that is the subject of the above cause by Adverse Possession." (CP 19) He asked the trial court to reverse the arbitrator's decision and dismiss Greeley's claims or, in the alternative, to remand the case to the arbitrator for rehearing. (CP 46).

Minnick filed a "Brief of Appellant" to which he attached documents. (CP 33-103) He did not file any declarations, nor did he file transcripts of any testimony presented to the arbitrator. Greeley filed a Brief of Respondent to which they attached documents but no testimony. (CP 104-61) Minnick filed "Appellant's Reply Brief" which consisted only of argument. (CP 162-67) On June 26, 2015, the trial court heard argument, orally declined Minnick's request, and upheld the arbitration award. (CP 184; RP 6/26/15) The court entered an order confirming its decision on July 31, 2015. (CP 187-91) On August 28, 2015, Minnick filed a notice of appeal to this court. (CP 195-206)

ISSUES

1. Should this appeal be dismissed because the court lacks jurisdiction under RAP 2.2(c)?

2. If the court considers the appeal, is the scope of review limited to that allowed under RCW 7.04A?

3. If the court considers the appeal, does the face of the arbitration award show an error of law that justifies vacating the award?

ARGUMENT

A. This appeal should be dismissed because the court does not have jurisdiction to hear it.

In the stipulation that allowed arbitration, the parties agreed to the extent of their right to appeal.

> The decision of the arbitrator shall be final and binding as to any facts determined, but shall be appealable to the Superior Court only as to errors as a matter of law (record review in the same procedure as appeals from Courts of Limited Jurisdiction). (CP 14, lns. 13-17)
>
> Should either party appeal on issues as a matter of law, the matter may be scheduled to be heard by motion, as would a proceeding from a ruling from a court of limited jurisdiction. (CP 15, lns. 5-9)

Simply put, the parties agreed to have appeals controlled by the Rules of Appeal from Courts of Limited Jurisdiction. This appeal involves review of the trial court's decision made pursuant to that stipulation.

Review by this court of a superior court decision on review of a

decision of a court of limited jurisdiction is controlled by RAP 2.2(c). The rule states:

> If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo. Appeal is not available if: (1) the final judgment is a finding that a traffic infraction has been committed, or (2) the claim originated in a small claims court operating under RCW 12.40.

Here, the trial court did not conduct a trial de novo. Minnick did not file a request for trial de novo. By stipulation, the parties agreed the appeal would be decided by a "motion." They presented no testimony and no sworn declarations which either provided testimony or authenticated any of the documents they submitted. Because this appeal does not meet the requirements of RAP 2.2(c), it should be dismissed.

B. If the court considers the appeal, it should limit the scope of review to that allowed under RCW 7.04A.

1. RCW 7.04A establishes the standard of review.

It is well established that parties to a lawsuit may not agree to extend the jurisdiction of the courts to a matter beyond the court's jurisdiction. See, e.g., *Barnett v. Hicks*, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992)(citing cases); *Washington Local Lodge No. 104 of Int'l Bhd. of Boilermakers v. International Bhd. of Boilermakers*, 28 Wn.2d 536, 544, 183 P.2d 504 (1947), adhered to, 28 Wn.2d 536, 189 P.2d 648 (1948) (if a court has no

jurisdiction of an action, the parties cannot by stipulation confer it upon the court); *Miles v. Chinto Mining Co.*, 21 Wn.2d 902, 903, 153 P.2d 856 (1944), affirmed, 21 Wn.2d 902, 156 P.2d 235 (1945) (the "universal rule" is that the parties to an action cannot, by stipulation, confer upon a court a jurisdiction with which it is not vested, citing 14 Am. Jur. 380, § 184; *Cogswell v. Hogan*, 1 Wash. 4, 23 P. 835 (1890); *Sawtelle v. Weymouth*, 14 Wash. 21, 43 P. 1101 (1896); *Seattle, L.S. & E.R. Co. v. Simpson*, 19 Wash. 628, 54 P. 29 (1898); *Mottet v. Stafford*, 94 Wash. 572, 162 P. 1001 (1917)); *State v. Diamond Tank Transp., Inc.*, 200 Wash. 206, 207, 93 P.2d 313 (1939); *Adams v. City of Walla Walla*, 196 Wash. 268, 271, 82 P.2d 584 (1938) (parties cannot stipulate a justiciable controversy exists so as to clothe this court with jurisdiction, where none exists under the pleadings and the record as made). See also *Schneider v. Setzer*, 74 Wn. App. 373, 872 P.2d 1158 (1994) (parties to arbitration proceeding could not, by stipulation, waive trial de novo in superior court in order to gain immediate review of arbitrator's decision in Court of Appeals).

Arbitration is a statutory proceeding. The rights of the parties to it are controlled by statutes. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 926 n.23, 169 P.3d 1 (2007), quoting *N. State Constr. Co. v. Banchero*, 63 Wash.2d 245, 249, 386 P.2d 625 (1963).

Washington's Uniform Arbitration Act, RCW chapter 7.04A, defines the scope of a trial court's review of a decision in a private arbitration. RCW 7.04A.220, 230, 240. RCW 7.04A.040(3) prohibits the parties from varying or waiving those standards.

> "The parties to an agreement to arbitrate may not waive or vary the requirements of . . . [RCW] 7.04A.220, 7.04A.230, 7.04A.240 . . .."

Thus, regardless of the parties' stipulation, the scope of the trial court's review, and of this court's review as well, is limited by RCW 7.04A.220, 7.04A.230, 7.04A.240. *Barnett v. Hicks*, 119 Wn.2d at 160-61.

2. The standard of review of private arbitration awards is de novo but limited to errors of law on the face of the award. The arbitrator's factual findings are not subject to review.

Washington courts give substantial finality to a decision by an arbitrator rendered in accordance with the parties' contract and chapter 7.04A RCW. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327(1998). Review by the trial court is extremely limited and does not encompass a review of the merits of the case. *Boyd v. Davis*, 127 Wn.2d 256, 267-68, 897 P.2d 1239 (1995). In general, the arbitration statutes only allow a trial court to confirm, vacate, modify, or correct an arbitration award. RCW7.04A.220,[1]

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1. RCW 7.04A.220 provides:

> After a party to the arbitration proceeding receives notice of an award, the party may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected

7.04A.230,[2] and 7.04A.240[3]. Absent an error of law on the face of the

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(cont.)
under RCW 7.04A.200 or 7.04A.240 or is vacated under RCW 7.04A.230.

2. 7.04A.230 provides:

> (1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:
>
> > (a) The award was procured by corruption, fraud, or other undue means;
> >
> > (b) There was:
> > (i) Evident partiality by an arbitrator appointed as a neutral;
> > (ii) Corruption by an arbitrator; or
> > (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> >
> > (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
> >
> > (d) An arbitrator exceeded the arbitrator's powers;
> >
> > (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or
> >
> > (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.
>
> (2) A motion under this section must be filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within ninety days after such a ground is known or by the exercise of reasonable care should have been known by the movant.
>
> (3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (1)(c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the

award, the trial court will not modify or vacate it. *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). A trial court reviewing an arbitration award is not permitted to conduct a trial de novo. *Id.* at 262-63.

Limited review is consistent with the purposes and policies of arbitration. "The very purpose of arbitration is to avoid the courts . . . ." It is designed to settle controversies, not to serve as a prelude to litigation. *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 131, 426 P.2d 828 (1967). "Washington public policy strongly favors finality of

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(cont.)
award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in RCW 7.04A.190(2) for an award.

(4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

3. RCW 7.04A.240 provides:

(1) Upon motion filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, the court shall modify or correct the award if:

(a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
(b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or
(c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(2) If a motion filed under subsection (1) of this section is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, the court shall confirm the award.

(3) A motion to modify or correct an award under this section may be joined with a motion to vacate the award.

arbitration awards." *S&S Constr.. Inc. v. ADC Props. LLC*, 151 Wn. App. 247, 254, 211 P.3d 415 (2009).

An appellate court's review of a trial court's review of an arbitration award is limited to the court that confirmed, vacated, modified, or corrected the award. *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wn. App. 744, 747, 929 P.2d 1200 (1997). The appellate court reviews de novo a trial court's decision to confirm or vacate an arbitration award. *Fid. Fed. Bank. FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004).

C. The face of the arbitration award does not show an error of law that justifies vacating the award.

Minnick does not state the grounds he relies upon for challenging the arbitrator's decision. He simply argues that the arbitrator erred in deciding that Greeley met the requirements for adverse possession. Presumably he is relying on RCW 7.04A.230(1)(d), which allows the trial court to vacate an award when the arbitrator exceeded the arbitrator's powers. An arbitrator exceeds his or her powers within the meaning of RCW 7.04A.230(1)(d) when the arbitration award exhibits an error of law. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236 P.3d 182, 183-86 (2010).

To justify vacating the award for an error of law, the error should be recognizable from the language of the award. *Federated Servs. Ins. Co. v. Norberg*, 101 Wn. App. 119, 124, 4 P.3d 844 (2000). In considering such a challenge, the court reviews only the face of the award to determine whether

it manifests an erroneous rule of law or a mistaken application of law. *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). The court will not review the merits of the case. *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998). Nor will it consider the evidence before the arbitrator. *Westmark Props., Inc. v. McGuire*, 53 Wn. App. 400, 401, 766 P.2d 1146 (1989). Examination of the underlying evidence is permissible only to the extent necessary to ascertain the law governing the disputed point. *Boyd v. Davis*, 127 Wn.2d at 260.

Here, Minnick argues in part that the arbitrator erred as a matter of law in deciding that Greeley met the requirements for adverse possession. These claimed errors take a variety of forms. For example, Minnick states "Respondents obviously failed to meet their burden of proving how they treated the property like a true owner would . . ." (Brief of Appellant at 7) He states "there is no way that Respondents can establish the type of possession necessary to establish their claim . . ." (Brief of Appellant at 13) He then goes on to describe the evidence both parties presented to the arbitrator (Brief of Appellant 13-15), and concludes:

> Respondents did not show they possessed the property consistent with ownership any different than how one with easement rights might demonstrate. In fact, if anyone showed dominion over the property like an owner, it would be appellant . . .. . .

(Brief of Appellant at 15) These, however, are arguments made to a fact-

finder. They simply challenge the evidence considered by the arbitrator and the merits of his decision. They do not present errors of law., Nor do they constitute challenges to the facial validity of the arbitration award.

As a subpart of this argument Minnick also contends the arbitrator erred as a matter of law by finding facts different than Greeley argued in their pre-hearing statement. But, pleadings are not evidence. *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, ¶17, 278 P.3d 197 (2012), review denied. 175 Wn. 2d 1027 (2012). Evidence is the testimony of the witnesses and the exhibits admitted. See Wash. Pat. Instr. (Civil) 1.01. Regardless, the argument again simply asks the court to reassess the evidence, which this court may not do.

Even if the court could consider these arguments, Minnick has failed to provide the court with a record sufficient to allow review. The arbitrator considered documentary evidence and heard testimony. Minnick has not provided the court with any of the testimony and has not shown which if any of the documents he considered. When the challenge is to the sufficiency of the evidence, a complete record must be provided. *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 332 n.10, 242 P.3d 27 (2010).

Minnick contends that the arbitrator misapplied RCW 7.28.070 by failing to require Greeley to show that their possession of the disputed property was hostile and exclusive. (Brief of Appellant at 9) Minnick

contends a claimant must show hostility and exclusiveness to be entitled to relief under this statute, but the arbitrator failed to require proof of those elements. If true, such error may be error of law. The argument, however, is incorrect for several reasons.

First, the face of the award does not show such error. The award only shows that the arbitrator decided it was unclear whether the statute required those elements. He stated:

> Left out of that statute are the words hostile and exclusive. The Legislative intent seems somewhat confusing because case law discusses those terms in the analysis by various courts. (CP 190 at ¶12)

This does not show that the arbitrator decided the statute did not require proof of hostility and exclusiveness.

Second, even if the arbitrator had incorrectly interpreted RCW 7.28.070, the face of the award shows the error would have been harmless. The award states:

> Even if we were to treat the statute as not doing away with the requirements of hostility and exclusive [sic], I believe that the Plaintiffs' use would still ripen into adverse possession . . .. (CP 191 at ¶19)

Thus, the arbitrator specifically found that even if the statute required hostility and exclusiveness, Greeley established those elements. In addition, the arbitrator also identified the elements of common law adverse possession (CP 190 at ¶10) and found facts sufficient to award under that theory as well.

(CP 190 at ¶¶1-9, 13-14, 18-19). Misinterpretation of the statute could not be harmful if the arbitrator found sufficient facts to apply the statute correctly, and also had other bases for his award.

Third, the arbitrator would not have erred even if he had not found that Greeley proved hostility and exclusivity. Determining the elements Greeley had to prove requires interpretation of RCW 7.28.070. Statutes are interpreted primarily from their language, giving plain and ordinary meaning to the terms used. *City of Bothell v. Gutschmidt*, 78 Wn. App. 654, 659, 898 P.2d 864 (1995). The court must not add words where the legislature has chosen not to include them. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

RCW 7.28.070 states:

> Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

On its face, the statute does not identify hostility or exclusiveness as elements. It only requires actual, open and notorious possession of lands or

tenements under claim and color of title, made in good faith, possession for seven successive years, and payment of taxes for the same period. Minnick does not explain how or why the court could interpret the statute any other way.

Consistent with Greeley's interpretation of the statute, Washington courts have clearly applied the statute without requiring proof of hostility or exclusiveness as requirements. *Harris v. Urell*, 133 Wn. App. 130, 135 P.3d 530 (2006); *Grays Harbor Comm. Co. v. McCulloch*, 113 Wash. 203, 206, 193 P. 709 (1920). Thus, in *Harris*, the court stated:

> To establish a claim of adverse possession, a party must show that her possession of the claimed property was, (1) for ten years, (2) exclusive, (3) actual and uninterrupted, (4) open and notorious, and (5) hostile. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); RCW 4.16.020. But if a claimant has held the claimed property for seven years under a "good faith color of title" and has paid all taxes on the disputed property, he need only prove "actual, open and notorious possession" for those seven years. RCW 7.28.070.

Harris v. Urell, 133 Wn. App. at 136-37. Though Greeley discussed *Harris* in the trial court (CP 112), and the arbitrator cited *Harris* in his letter ruling (CP 25), Minnick fails even to mention it in his analysis to this court.

Instead, Minnick relies on *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 613 P.2d 1128 (1980), and a passage from the Washington Practice Manual. Neither are persuasive. *Peeples* was not a "color of title" adverse possession case under RCW 7.28.070. The claimed adverse possessor

presented no evidence that it had paid taxes necessary to trigger that statute. Therefore, the court analyzed the claim under the requirements of a traditional 10 year adverse possession claim and concluded the claimant had not proved the elements of that claim either. Tellingly, however, in its discussion of RCW 7.28.070, the court stated:

> In order to gain title to property held under "color of title," a claimant must have more than a claim made in good faith. RCW 7.28.070, .080. The statute requires not only "actual, open and notorious possession of lands", but also payment of legally assessed taxes for 7 years in succession. RCW 7.28.070.

93 Wn.2d at 777. The court said nothing about the statute requiring proof of hostility or exclusivity. To the extent it applies at all, *Peeples* supports Greeley's interpretation of the statute. The passage in Washington Practice is unsupported by citation to authority, and merely represents the author's personal opinion. 17 Wash. Prac. ¶ 8.2 at 507. Because that opinion does not square either with the language of the statute or the holdings of Washington courts, it is unpersuasive.

Minnick also seems to argue that because the property was burdened by an easement, Greeley could not have adversely possessed it. He cites no authority for the proposition. An easement does not preclude a claim for adverse possession. See *Littlefair v. Schulze*, 169, Wn. App. 659, 278 P.3d 218 (2012), rev. denied, 176 Wn.2d 1018 (2013). Such a rule would effectively immunize property burdened by an easement from claims of

adverse possession. The arbitrator found that Greeley asserted their control by limiting Minnick's use of the property beyond the scope of his easement. (CP 190 at ¶8) Minnick offers no reason why that was not sufficient.

After hearing the testimony and considering documents, the arbitrator in this case made factual findings that supported his decision. (CP 189-91) These included finding that Greeleys were deeded the property in 1997 (FOF 3, 6); from 1997 to 2011 all parties believed Greeleys were the owners (FOF 4); from 1997 to 2011 Greeley asserted control over the property and Minnick did not contest that control (FOF 8); the 1997 deed gave Greeley color of title (FOF 13); Plaintiffs cared for, used and asserted control over the property in a way consistent with ownership (FOF 14, 18); and Greeley's use was sufficient to show hostile and exclusive possession (FOF 19). These findings were sufficient to establish adverse possession under both RCW 7.28.070 and traditional analysis. The face of the award does not show an error of law that justifies vacating the award.

CONCLUSION

For the foregoing reasons, Respondents ask the court to dismiss the

appeal or, in the alternative, affirm the trial court's order and judgment.

Dated this 7th day of January, 2016.

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December 12, 2014

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Re: *Greeley v. Minnick*

Dear Counsel:

First, my apologies for the lengthy delay in getting this decision out. I would like to say that I have a good excuse, but there is none. You and your clients deserved a more timely response.

This was a very difficult case to resolve. Candidly, I see significant equities on both sides. On balance however, I believe Mr. Wambold's clients, the Greeleys prevail. My findings are as follows:

1. Greeley's purchased their property in 1987 and received an easement, 60' wide, half on their property and half on the property to the east, which was ultimately the Defendant's property.

2. At the time, Millers owned the property to the east, including that portion subject to the easement.

3. In 1997, Plaintiffs were deeded what they and everyone else believed was the east portion of the easement property.

4. From 1997 through the first part of 2011, it appears that all parties believed Plaintiffs owned that portion of property.

5. The eastern part of the easement, although supposedly belonging to Plaintiff, was still subject to a non exclusive easement, which benefitted the Defendant.

6. In 1999, Millers conveyed their property to Defendant. The deed excepted the West 30 feet of the property from the transfer. This was the east portion of the easement which everyone believed had been deeded to Plaintiff in 1997.

7. There was some maintenance and improvement done on the property by both sides. I am not convinced that it was exclusively done by Plaintiffs as they testified.

8. From at least 1999 through mid 2011, the property in question was used more or less as intended with both sides using it for access as necessary and Plaintiffs asserting some control to made certain debris and excess equipment did not accumulate. I do not find that Defendant contested Plaintiffs' ownership of the property as long as he continued to have access through his easement.

9. Things changed in 2011 when, for one reason or another, Pierce County apparently corrected an old mistake and through a deed signed by Miller, the property in dispute was conveyed to Defendant. The question then, is whether the Plaintiffs acquired title to the property by adverse possession.

10. Traditional adverse possession analysis would require that Greeley's show actual, uninterrupted, open and notorious, hostile, exclusive, and under a claim of right possession for a period of ten years.

11. RCW 7.28.070 seems to be a modification of the traditional adverse possession elements. It states:

> Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

12. Left out of that statute are the words *hostile* and *exclusive*. The Legislative intent seems somewhat confusing because case law still discusses those terms in the analysis by various courts.

13. The 1997 deed to Plaintiffs gives them color of title.

14. Plaintiffs caring for the property by mowing, having items removed from it and both proclaiming the property and in all respects treating it in a way consistent with ownership I believe satisfies the actual, open and notorious possession requirements.

15. Hostility has been treated the same as under claim of right. The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. Chaplin v. Sanders, 100 Wash. 2d 853, 860-61, 676 P.2d 431, 436 (1984).

16. Hostility has also been treated as making use of the property as a true owner would.

17. Adverse possession need only be as exclusive as one would expect of a titled property owner under the circumstances. Harris v. Urell, 133 Wash. App. 130, 138, 135 P.3d 530, 534 (2006).

18. In this case, since the property is and continues to be subject to an easement, Plaintiffs' use would seem to be virtually the same as any titled owner would use it. Exclusive does not mean no one else can set foot on the property. Had there been no easement, in that instance Plaintiffs' use would not rise to the level of a typical property owner whose interest was not burdened by the easement.

19. Even if we were to treat the statute as not doing away with the requirements of hostility and exclusive, I believe that the Plaintiffs' use would still ripen into adverse possession, given that the property is subject to an easement which would impact the expected use of an owner.

For the above reasons, I believe that Plaintiffs have prevailed on the claim of ownership by Adverse Possession. The 60' easement remains in place.

I believe an order consistent with this ruling should be drafted. An award of statutory costs to Plaintiffs should be included. Please advise whether anything was done to convert this matter as one subject to mandatory arbitration, with fees paid by the county, or whether fees will be paid by the parties.

Very truly yours,

ANTONI H. FROEHLING

AHF/bh

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COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION TWO

DONALD W. GREELEY and BESSIE L. GREELEY, husband and wife Respondents, vs. FRANK A. MINNICK and JANE DOE MINNICK, husband and wife Appellants.	NO. 48051-4-II CERTIFICATE OF SERVICE

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 7th day of January, 2016, I did place with the United States Postal Service, first class postage paid, the Brief of Respondents and this Certificate of Service to the following:

Mark E. Bardwil
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Clerk of the Court
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Division Two
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GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE. 253.627.0684 FACSIMILE: 253.627.2028

I declare and state under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 7th day of January, 2016, at Tacoma, Washington.

By : _____
TIMOTHY R. GOSSELIN

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